

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellants,

v.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

v.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellees.

**REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE
UNIVERSAL PICTURES COMPANY, INC. TO AP-
PELLEE'S ANSWERING BRIEF.**

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I.

**The record refutes the unsavory comments directed
at defendant Universal's opening brief.**

(1) Page 2. Plaintiff's brief is replete with the statement that the alleged infringement comprises "57 consecutive scenes." In support of this statement plaintiff refers to the judgment (Tr. p. 42) and in support of the judgment plaintiff refers to the Court's finding (Tr. p. 34). Yet plaintiff refers to no evidence in the record

to support the finding. Under Point I of its reply brief (pp. 1, 2) defendant Universal pointed out that one of its specifications of error was to this finding, as "There is no evidence in the transcript to support this erroneous finding." Plaintiff apparently has reference to the numbers appearing in the left hand margin of the script of each picture (Pltf's Exs. 3, 5). Reference to said exhibits evidences that these numbers indicate the camera shots and not scenes. Thus in the script of defendant's picture (Pltf's Ex. 3, Part 4) the numbers 67 to 112 inclusive indicate 45 different camera shots in a part of one scene, of an orchestra playing a single composition on a jute box record. Plaintiff's brief is likewise replete with the statement that the alleged infringing material comprises "20%" of the picture. There is no evidence in the record to support this statement. On the contrary it was stipulated that the running time of defendant's picture is 63 minutes, 21 seconds, while the running time of the entire magician's coat comedy routine (in which the alleged infringing "gags" and "stage business" appear) is only 6 minutes, 1 second (Tr. pp. 384, 385). Likewise plaintiff's counsel conceded (Tr. p. 71):

"Mr. Fendler: So far as the actual footage is concerned, the amount of footage is comparatively small. As nearly as I can compute it in terms of percentage it is not more than about 12 and one-half percent of the total amount of feet, running feet, in the picture."

(2) Page 3. Plaintiff states: "There was no evidence that anyone in the Lloyd organization had ever heard of any infringements by any Universal picture prior to March, 1945, and shortly before Lloyd's counsel notified Universal to cease and desist from distribution of all infringing pictures" (March 20, 1945). Lloyd's testimony was to the contrary (Tr. pp. 152, 153).

"Q. How long after the release and exhibition of 'So's Your Uncle' actually started was it that your attention was called to this sequence?

A. Well, I don't know the exact time Mr. Murphy brought it to my attention. It was in one of the trade papers where they had said that they had—

Q. Do you know when it was?

A. No, I don't know the exact time.

* * *

Q. Do you think it would be a fair statement to say that the date of your first protest to Universal represents approximately the date when you first learned of the exhibition of this picture?

A. No. No, I learned of it prior to—I had to decide what I wanted to do with it—

* * *

Q. Just a moment. Can you tell me then, Mr. Lloyd, about how long before notice was given to Universal that you first learned of the exhibition of the picture entitled 'So's Your Uncle'?

* * *

The Court: The only thing is that the witness says he doesn't know. You are asking him questions and trying to tie him down to something that he keeps telling you he doesn't know. He says Mr. Murphy attended to those things and could give you the information, but he does not have the dates."

Mr. Murphy was not called. Defendant's picture was generally released throughout the United States on December 3, 1943 (Tr. p. 384). Plaintiff had the burden of proving its ignorance of the alleged infringement for any period subsequent to December 3, 1943, and when and how its knowledge was first obtained (Deft. Universal's opening brief, pp. 72, 73).

(3) Page 3. Plaintiff states that the admission in defendant Universal's answer "that said defendant has continued with the distribution and exhibition of said motion picture photoplay" after notice of the alleged infringement, supports the Court's finding to such effect. To

obviate said defendant introducing testimony to correct this inadvertent error in its answer, plaintiff's counsel stipulated that shortly after the receipt of the first notice of plaintiff's alleged claim (March 20, 1945) said defendant did send out instructions to all its exchanges to stop the exhibition of the picture, which instructions were thereupon complied with (Tr. p. 452).

(4) Page 11. Plaintiff further states regarding the stipulation (referred to in (3) above): "It is furthermore untrue that plaintiff 'stipulated that exhibition of defendant's picture had been stopped upon the receipt of plaintiff's notice of infringement' * * *. The record shows a stipulation that Universal sent instructions to its exchanges to stop the exhibition but the exact date of such instructions was never given and plaintiff's counsel expressly stated: 'I will not stipulate the instructions were complied with' (Tr. p. 452)." Plaintiff stipulated that such instructions were given "shortly after receipt of the notice of this communication of March 20." Furthermore, while plaintiff says "plaintiff's counsel expressly stated 'I will not stipulate the instructions were complied with,'" the part of the record immediately following the above quotation (which plaintiff has naively omitted) evidences the direct contrary:

"Mr. Fendler: I will stipulate such instructions were given. I will not stipulate the instructions were complied with.

Mr. Abeles: To the best of our knowledge they were complied with.

Mr. Fendler: You do not contend the plaintiff is not entitled to an injunction do you?

Mr. Abeles: No.

Mr. Fendler: Very well, *we will so stipulate.*"

(5) Page 12. Plaintiff states: "Furthermore, on September 13, 1946, six months after the written notice, Universal's counsel had stated in open court that the picture 'will be' withdrawn (Tr. p. 345); he later ex-

pressly stated he did not contend that plaintiff was not entitled to injunction (Tr. p. 452).'' At the end of the first session of the trial, plaintiff's counsel had asked for a temporary injunction. The Court said that plaintiff could apply for an injunction if there was ever any showing that the exhibition of the picture was resumed, to which defendant's counsel replied that it would be withdrawn *if* there was any such future showing. In view of this, the Court held "there is no occasion for granting an injunction which will have to be on bond to protect the plaintiff (Tr. pp. 345, 346). In fact, at the later session of the trial, plaintiff's counsel stipulated that upon receipt of notice of plaintiff's alleged claim, said defendant had given instructions to all its exchanges to stop the exhibition of the picture, which had been complied with (Tr. p. 452). Defendant's counsel merely agreed that plaintiff should be entitled to an injunction if it succeeded in the action, as a condition of plaintiff's stipulation that the exhibition of the picture was stopped upon receipt of said notice (Tr. p. 452):

"Mr. Fendler: You do not contend that plaintiff is not entitled to an injunction, do you?

A. No.

Mr. Fendler: Very well, we will so stipulate."

(6) Pages 4-8. Plaintiff takes issue with the statement of said defendant, that it was not aware it was infringing and such alleged infringement could not have been reasonably foreseen. However, the unrefuted evidence supports this position (Tr. pp. 235-238, 310-313, 316, 317, 321-326, 330-332, 335-340).

(7) Page 7. Referring to Sec. 25 of the Copyright Act (Act. of March 4, 1909, Ch. 320, 35 Stat. 1081) plaintiff says: "In no event does the \$5,000.00 limitation apply to actual damages. The limitation is solely upon statutory damages * * *." On the contrary, Sec. 25 specifically provides:

“That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: * * * (b) To pay to the copyright proprietor *such damages* as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * *, or in lieu of actual damages and profits *such damages* as to the Court shall appear to be just * * *; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, *the entire sum of such damages* recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, *nor shall the limitation as to the amount of recovery* apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.”

In *L. A. Westermann Co. v. Dispatch Printing Co.*, 233 Fed. 609, 613 (Cir. Ct., 6th Cir.), the Circuit Court expressed doubt as to whether the maximum and minimum applied to actual damages recoverable under the first part of the section:

“The statute says that ‘such damages shall’ be governed by a maximum and minimum. Whether

this phrase, 'such damages,' and the maximum and minimum limitations, apply to the actual damages which may be proved and established under the first part of this section, or only to the 'just' damages given 'in lieu of actual damages,' cannot be determined from mere arrangement of the language, but must depend upon more indirect interpretation. This question likewise does not directly require decision in this case. The limitations unquestionably apply to the 'in lieu' damages, which are the only ones here involved; their application to actual damages may be passed over."

Upon appeal (249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499) the Supreme Court was only concerned with the minimum recovery, which it held applied in all cases.

Thus in *M. Witmark & Sons v. Calloway*, 22 Fed. (2d) 412, 414, the Court said, in citing and following *L. A. Westermann Co. v. Dispatch Printing Co.*, *supra*:

"The damages indicated in the proof are small, but cannot be fixed at less than \$250, and they are therefore fixed at that sum. Section 25 of chapter 320, 35 Stat. 1081, known as the Copyright Act; *Sauer v. Detroit Times Co.* (D. C.) 247 F. 687, opinion by Judge Tuttle, one of the judges of the Sixth Circuit; *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499, affirming upon the point *Westermann Co. v. Dispatch Printing Co.* (C. C. A.) 233 F. 609, in certiorari from the Sixth Circuit; also memorandum opinion of this court in *Henry L. Cravens et al. v. Retail Credit Men's Ass'n*, 23 F. (2d)—October 20, 1924. See, also, *Jerome H. Remick Co. v. Gen. Elec. Co.* (D. C.) 16 F. (2d) 829, and *Waterson, Berlin & Snyder Co. v. Tollefson* (D. C.) 253 F. 859."

Accordingly, if the minimum applies to actual damages recoverable under the first part of the section, the maximum must likewise apply. In the instant case plaintiff

has failed to establish actual damage, and as defendant's profits were stipulated, plaintiff's recovery in any event should be limited to that part of such stipulated profits due to the infringement.

(7) Page 8. Plaintiff makes capital of an obvious typographical error in said defendant's opening brief (p. 31), reading: "Plaintiff's witness Hirliman" instead of "Defendant's witness Hirliman." Said defendant called this error to the attention of the Clerk of this Court, who advised that the error had been corrected on all filed copies of the brief.

(8) Page 8. Plaintiff states: "Similarly misleading is the statement that the Trial Court 'recognized that as this sequence was not a part of the general theme, it could be deleted without affecting the picture.'" The record evidences (Tr. p. 141):

"The Court: And I have been asking questions. I want to say frankly, because I feel that this is a part of the whole that could be lifted out and I am trying to get that approach."

(9) Page 9. Plaintiff states that "defendant Universal apparently objects to the Trial Court's consistency in excluding defendant's offered evidence as to the price paid for a 'silent' motion picture 'Girl Shy' (Tr. p. 447) after the Court had sustained defendant's objections to similar proof offered by plaintiff with respect to comparable 'talking' motion pictures like 'Movie Crazy.'" The picture was not "Girl Shy" but "Safety Last" (Tr. pp. 428-430). It did not suit Lloyd's purpose to admit that the rights to one of his best pictures had been sold for only \$3,500. Neither did it suit his purpose to admit that not one exhibitor would take the picture, because there was no demand for the re-issue or re-make rights of any pictures of this nature, as distinguished from a picture based upon a famous stage play or novel (Tr. p. 460). So Lloyd denied that such rights had ever been sold to

any of his pictures (Tr. p. 354) and testified that the rights to the picture "Safety Last" would "probably be very valuable" (Tr. p. 352). This proof was offered by defendant for the sole purpose of contradicting Lloyd's testimony upon this material point in issue (Tr. pp. 428-430). Plaintiff, however, offered evidence of the price paid for the re-make rights to pictures based upon famous stage plays and novels, although plaintiff's witnesses confirmed the testimony of defendant's expert Hirliman, that no picture of the type of "Movie Crazy" (where the story and comedy material was specially written for the personality of a particular comedian) had ever been re-made (Tr. pp. 363, 364, 469, 470, 434, 437-440, 448). Likewise, as Lloyd conceded that the only picture of the latter type which in his opinion might be successfully re-made, was Chaplin's picture "The Gold Rush" (Tr. p. 364), such proof offered by plaintiff could serve no possible purpose.

(10) Pages 12, 13. Plaintiff states: "The damage done by Columbia's infringements was not pleaded in mitigation and the amount of such damages was not in issue in this lawsuit." Such matter need not be affirmatively pleaded.

Chicago, M. & St. P. Ry. Co. v. Holverson, 264 Fed. 597, 600 (Cir. Ct., 8th Cir.):

"The court excluded the testimony for the stated reason that this element of defense was not set up in the answer. The exclusion cannot be sustained. The burden was upon the plaintiff to make his case. The general issue was tendered. Under it, any matter of this nature, affecting the right of plaintiff to recover, or conditioning the amount of his recovery, could properly be shown."

To the same effect:

United States v. Homestake Min. Co. 117 Fed. 481, 490.

Furthermore, the issue of the prior use by Columbia of the same material was first raised at the trial by plaintiff's counsel (Tr. p. 61):

"Mr. Fendler: * * * It appears that Clyde Bruckman, after he left Harold Lloyd's employ, went to work for Columbia Pictures Corporation as a writer and, in 1941, in a two-reel comedy, used the same identical sequence which appears in the Lloyd picture and which appears in the Universal picture."

The preliminary evidence was then developed at the first session of the trial, without objection (Tr. pp. 151, 153, 154, 159). The deposition of the representative of Columbia was subsequently taken, and received in evidence *by stipulation* at the second session of the trial (Tr. p. 388):

"Mr. Abeles: I just wanted to ask him one thing. Your Honor, at the this time I would like to offer in evidence, and I understand it is on file, isn't it? The deposition of the Columbia Pictures Corporation. I have a copy here. It is the deposition of George Josephs of Columbia Pictures Company, taken on October 31, 1945, at 2:00 p. m., before Shirley Wiley, Notary Public in New York City.

The Court: Are you going to introduce the deposition in evidence?

Mr. Abeles: I offer it in evidence with the direct and cross interrogatories.

Mr. Fendler: That is satisfactory. We will *stipulate* it may be deemed to have been received."

Plaintiff concedes that "the *amount* of such damage (by the Columbia picture) was not an issue in this lawsuit." That is the basis of defendant's argument. The evidence established and the Court said in its opinion that the Columbia short affected the amount of plaintiff's recovery against this defendant (Tr. p. 521). There was no evidence of the *amount* of damage resulting from this prior separate cause. The Trial Court said: "I find and fix the

actual damages suffered by Mr. Lloyd in the sum of \$40,000" (Tr. p. 522). The proof was too uncertain to permit the Court arbitrarily to apportion a part of such alleged damages (by both Columbia and defendant) to the subsequent acts of defendant. How then could the Court award all of such alleged damages against defendant?

Plaintiff had the burden of showing what part of its alleged loss was due to the acts of Columbia, and what part to the acts of defendant.

Corpus Juris Secundum, Vol. 25, Damages, Sec. 28, page 496:

"Where there is evidence as to damage from various causes, as to a portion of which defendant cannot be held responsible, and no evidence as to the portion of the damage resulting from the separate causes, the proof is too uncertain to permit the jury arbitrarily to apportion a part of all of the proved damages to the acts for which defendant is responsible." Citing *Wade v. Thorsen*, 43 Pac. 2d 592, 5 Cal. App. 2d 706; *Austin v. Roberts*, 20 Pac. 2d 97, 99, 130 Cal. App. 328.

No recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause.

Thus in *Union Oil Co. of California v. Hunt*, 111 Fed. (2d) 269, 277, 278 (Cir. Ct., 9th Cir.), cited on page 63 of plaintiff's brief, this Court quoted and followed the settled rule of law enunciated in *American Jurisprudence*:

"It is said in the article on 'Damages,' in *American Jurisprudence*:

'The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed.' 15 Am. Jur. § 20, p. 410.

'The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of. Hence, no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause, * * *.' 15 Am. Jur. § 22, p. 413."

Plaintiff likewise states: "The files of the United States District Court for the Southern District of California, Central Division, in action No. 5184-W, reflect the fact that the Harold Lloyd Corporation filed suit several months ago against Columbia Pictures Corporation and Clyde Bruckman for infringements by the Columbia 'short.' " Plaintiff alleged in the complaint in this action, that by reason of defendant's use of the alleged infringing material "plaintiff's rights have been totally destroyed" (Tr. p. 5). Plaintiff's action against Columbia is to recover the same damages, for the prior use of the same alleged infringing material. The Columbia picture had been exhibited in more theatres than defendant's picture (Tr. pp. 90, 391), "in all states in the United States—in all types of cities, both large and small, throughout the United States—in all types, kinds and characters of motion picture theatres in the United States, varying from large to small theatres in metropolitan areas as well as theatres in large and small towns" (Tr. p. 391). How then could the Trial Court determine that defendant's picture had caused any additional damage to plaintiff's picture—much less the total amount of plaintiff's alleged damage?

(11) Page 2. App. I. Plaintiff states that defendants did not object to Lloyd's testimony as to the alleged damage sustained by plaintiff. On the contrary, such

testimony was received over defendant's repeated objections and motion to strike (Tr. pp. 100, 102, 104, 105, 138, 140, 490, 492, 493, 27, 524).

(12) Page 3, App. I. Plaintiff states that defendant's witness Hirliman confirmed Lloyd's testimony that re-issuing a picture is a well-known practice in the industry. On the contrary Lloyd testified (Tr. p. 369):

"The Court: And is that more or less of a common practice in the industry?

A. Well it could be.

The Court: Well, do you know whether it is?

The Witness: I think it is to a degree."

The witness subsequently conceded that he was not qualified and in no position to express any opinion as to the availability or value of such rights:

"The Court: And do they interchange them between studios?

The Witness: I think so.

The Court: Don't you know?

The Witness: I am not positive because I have kept myself more or less in the production end of the business * * *'' (Tr. p. 369).

The Court recognized that this testimony had completely disqualified the witness:

"I was asking general questions as to the practice in the industry which will probably come out through other witnesses that have handled that end of the business and will be qualified to testify" (Tr. p. 371).

Hirliman testified that while a picture, comedy or otherwise, based upon a famous stage play or novel might have a re-issue or re-make value, a picture of the nature of plaintiff's, that is a situation comedy where the story and comedy material was written specially for the personality of a particular comedian, would have no value for such purpose (Tr. pp. 434, 437-440, 448); and that in

the entire history of the industry no such picture of the latter type had ever been re-made (Tr. p. 448); which was confirmed by plaintiff's witnesses (Lloyd, Tr. pp. 363, 364; Botsford, Tr. pp. 469, 470).

(13) Pages 19-25, App. II. Throughout its brief plaintiff refers to the Court's finding (Tr. p. 34) that "the characters, characterization, motivation, treatment, action and sequence of action," in the magician's coat sequence in defendant's picture were copied from plaintiff's picture. Likewise in App. II, under the heading "The Deadly Parallel," plaintiff distorts the pertinent parts of the scripts of both pictures, and concocts innumerable fictitious parallels, in a strained effort to justify the Court's erroneous finding. The same "gags" and "stage business" had been used by plaintiff in another picture (Tr. p. 73) and in the Columbia picture (Tr. p. 61). The Court said that "it was no part of the general theme," was merely "cut into the picture" for comedy accretion (Tr. pp. 142, 143), and accordingly was "a part of the whole that could be lifted out" as readily as it was "cut in" (Tr. pp. 139, 141). Such "gags" and "stage business" had been inserted in defendant's picture, after the particular sequence was created as they had been in plaintiff's picture, for comedy accretion to the story (Tr. pp. 228, 235, 236). Plaintiff's counsel conceded upon the trial, that the extent of plaintiff's claim was that this material "was interpolated into the Universal picture" (Tr. p. 69).

II.

Plaintiff's argument and the pertinent cited authorities are not in accord.

Pages 49-51. Plaintiff attempts to discard a number of English cases cited by defendant as "no longer the law," with a quotation from *Falcon v. Famous Players Film Corp.*, 2 K. B. 474, to the effect that the 1911 Act "was intended to enlarge protection to authors, and to sweep away those decisions by which rights had been limited,

as against *the makers of mechanical instruments* by which their works could be reproduced." This decision did not question the established rule of law expounded in the cases cited by defendant, that "gags" and "stage business" having no dramatic quality are incapable of copyright protection.

Page 52. The following part of plaintiff's quotation from the decision of this Court in *Harold Lloyd Corporation v. Witwer*, 65 Fed. (2d) 1, 16, is in complete accord with defendant's argument, that such "gags" and "stage business", being merely comedy accretion to the story, their use cannot constitute an infringement of plaintiff's copyright:

"None of these gags and no such sequence is in the story. Consequently there was no effort to reproduce some such humorous situation in the story, but the purpose was to create a separate distinct sequence in the case of each gag to produce laughter on the part of the audience. It is not contended that these matters were copied from the story; on the contrary, it is admitted that there is a large amount of original material in the play. There is nowhere any slavish copying of anything in the story of Rodney."

Pages 61, 62. Plaintiff indicates two quotations from *25 Corpus Juris*, Sec. 28, pp. 493, 494, but apparently has reference to *25 Corpus Juris Secundum*. The parts quoted, however, are qualified by the quotation following (p. 496):

"However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered;"

Page 62. The decisions in *Sinclair Refining Co. v. Jenkins*, 289 U. S. 689 (53 Sup. Ct. 736, 77 L. Ed. 1449) and *Palmer v. Connecticut Ry. Co.*, 311 U. S. 544 (61 Sup. Ct. 379, 85 L. Ed. 336) have been misinterpreted by plaintiff. (See Universal's Reply Brief, pp. 2-6).

Page 63. The decision in *United States Frumentum Co. v. Lauhoff*, 216 Fed. 610, has been misinterpreted by plaintiff. (See Universal's Reply Brief, pp. 8-11).

Page 63. *President & Directors of the Manhattan Co. v. Kelby*, 147 Fed. (2d) 465. The quotation from *Story Parchment Co. v. Paterson*, 282 U. S. 555, 563 (51 Sup. Ct. 248, 75 L. Ed. 544) is qualified by the statement "the damages may not be determined by mere speculation or guess." Thus in the later case of *Bigelow v. R. K. O. Radio Pictures, Inc.*, 327 U. S. 251, 264 (66 Sup. Ct. 574, 90 L. Ed. 579) the Court said to the same effect: "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork."

Page 63. *John B. Stetson Co. v. Stephen L. Stetson*, 85 Fed. (2d) 586. Plaintiff's alleged quotation does not appear in the decision.

Page 63. In *Union Oil Co. of California v. Hunt*, 111 Fed. (2d) 269, 277, this Court said (p. 278):

"For Oregon authority that the quantum of damages cannot be based upon or left to speculation, surmise, or guesswork, see *Albright v. Keats Auto Co.*, 85 Or. 134, 166 P. 758. See also 17 C. J. § 90, p. 758."

Page 64. *Broadway Photoplay Co. v. World Film Corp.*, 225 N. Y. 104, 109 (121 N. E. 756). Plaintiff quotes as follows:

"The plaintiff was not required to prove its damages to the dollar."

However, this is qualified by the sentence following:

“It was required, however, to supply some basis of computation (authorities cited); and this it did not do.”

The Court said further (p. 108):

“But there is nothing in the evidence to supply a basis for the comparison. No law of averages, no constant or approximate uniformity of returns, can be gathered by induction from the sporadic and varying instances scattered through this record. The pictures of the first run are few in number. They disclose no semblance of equality in their returns when compared with one another. They disclose a like diversity when compared with pictures of later runs. * * * Nothing but guesswork can place the damages at \$4,500 or any other fixed amount.”

Page 65. *Muther v. United Shoe Machinery Co.*, 21 Fed. (2d) 773. The Court held (p. 776):

“The plaintiff carries the burden of proving by competent evidence his damages resulting from lost royalties or lost profits. In determining the extent of such damages, the Court may not indulge in conjecture or speculation. The damages must be shown by ‘clear and definite proof.’ ”

The Court said that as plaintiff had not proved his damages by “clear and definite proof” and as profits were not shown, it was a “typical case” for the recovery of statutory damages (the “reasonable royalty” rule, Sec. 70 Patents, 35 U. S. C.).

Page 65. *Paramount Productions, Inc. v. Smith*, 91 Fed. (2d) 863. The action was for breach of contract for failure to give screen credit to plaintiff. This Court said (pp. 866, 867):

“We do not believe the evidence is subject to the charge of uncertainty. Appellee testified that he and

another writer collaborated in writing a story and sold it without screen credit for \$10,000, which the two writers divided. Appellee's story was sold for \$2,500, but under a contract that required that he be given screen credit. From these figures, the jury might easily compute the advertising value of the screen credit. He also testified that he received screen credit for a play; that prior thereto his salary was \$250 per week; and that afterward he received \$350 per week at one time, and \$500 per week for a period of two weeks, due to the screen credit he had received. That evidence is, if believed, likewise sufficient as a gauge for the measure of the damages."

Page 67. *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 Fed. (2d) 45. The case involved an apportionment of profits, not proof of damages. The Court cites *Pieczonka v. Pullman Co.*, 102 Fed. (2d) 432, which being a death case, the Court recognized that the mortality tables furnished a proper basis of expectancy.

Page 68. *Bigelow v. R. K. O. Radio Pictures, Inc.*, 327 U. S. 251 (66 Sup. Ct. 574, 90 L. Ed. 579). Plaintiff omits the following statement preceding its quotation, which materially affects the purport of the part quoted (p. 264):

"In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."

Page 69. *Gotham Silk Hosiery Company v. Artcraft Silk Hosiery Mills*, 147 Fed. (2d) 209. The question involved was the proper apportionment of profits. The Court said (p. 214) that as the defendant had deliberately destroyed its records from which an apportionment could have been made, after the action for accounting was com-

menced, the burden of proof of apportionment shifted to the defendant.

Page 69. *American Law Institute Restatement of Contracts*, Par. 331 (cited by plaintiff as 33), Comment a. The statement of law preceding this comment (p. 515) reads:

“Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.”

Page 69. *Story Parchment Co. v. Paterson*, 282 U. S. 555 (51 Sup. Ct. 248, 75 L. Ed. 544). The action was to recover damages under the Sherman Anti-Trust Act, as a result of defendant's unlawful combination. As the defendants were going businesses, the Court said (p. 561):

“There was evidence from which the jury reasonably could have found that in pursuance of the conspiracy respondents sold their goods below the point of fair profit, and finally below the cost of production; that petitioner had an efficient plant and sales organization, and was producing a quality of paper superior to that produced by either of the three companies; and that current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterward. * * * there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated.”

Page 69. *Dowagiac Manufacturing Company v. Minnesota Moline Plow Company*, 235 U. S. 641 (35 Sup. Ct. 221, 59 L. Ed. 398). The action was for patent infringement. The Court said (p. 648) that as there was “no adequate

basis for the assessment of damages," and there being no proof of profits, the "reasonable royalty" rule (Sec. 70 Patents, 35 U. S. C.) was applicable.

Pages 70-74. The cases cited by plaintiff under Point III (B) merely enunciate the general rule of law, that an owner can testify, to his knowledge of the value of his property, but as said in *22 Corpus Juris, Evidence*, Sec. 683, page 582:

"An owner cannot be allowed to state a special value which the property has to him, or the amount at which he valued the property, as distinguished from its real value."

Obviously this rule of law has no application. In the instant case *Lloyd's* testimony was not as to the value of plaintiff's property. He was permitted to testify over defendant's objections and motion to strike (Tr. pp. 100, 102, 104, 105, 138, 140, 490, 492, 493, 27, 524) to (a) the profits which in his opinion plaintiff or someone else might make if they should ever re-issue or re-make plaintiff's picture, and (b) the extent to which the use of the alleged infringing material in defendant's picture might affect the amount of such profits, if defendant's picture ever was re-issued or re-made by plaintiff or someone else, viz.:

"Q. Prior to the release of the motion picture entitled 'So's Your Uncle', by Universal during the month of December, 1943, what was the value of the re-issue rights of the motion picture 'Movie Crazy'?

A. I would say it should be well over \$100,000.

Q. And what was the value of the re-issue rights of 'Movie Crazy' after the production and distribution of 'So's Your Uncle'?

A. I would say it has been destroyed.

Q. What was the value of the re-make rights of 'Movie Crazy' before the production and release of the Universal picture 'So's Your Uncle' as of December 1, 1943?

A. I would say it would be \$200,000, probably a great deal more, according to the quality of the picture.

Q. By Mr. Fendler: What is the value of the re-make rights of 'Movie Crazy' as of the present time?

A. I would say that also was destroyed." (Tr. pp. 104, 105.)

He evaluated such rights solely upon the prospective profits that plaintiff might make if it ever should exercise such rights, or the prospective profits some other producer might make if plaintiff should ever sell such rights.

"Q. Your idea, as I understand it, is these re-issue rights might be sold to somebody who would have new prints made of the film and would distribute it throughout the theatres of the country?

A. They might do that or I might do it myself." (Tr. p. 149.)

* * *

"Q. By Mr. Abeles: You say you had in mind two things—either you would re-make it or somebody else would re-make it, is that correct?

A. Naturally.

Q. Now, if you re-made it did you have in mind that figure you testified to as being the profit that you would make from making the picture? * * *

The Witness: You are asking me to assume something. I think you can make a great deal of profit if I made it myself and I think someone else could make a great deal of profit if they also re-made it." (Tr. p. 360.)

* * *

"Q. When you state that figure who have you got in mind would re-make it? You or somebody else?

A. Myself or somebody else. It would be according to how well done it is. That is what I tried to make plain." (Tr. p. 361.)

"Q. By Mr. Abeles: What do you base that figure upon if you re-made it yourself? That is a simple question. Just answer that, please, Mr. Lloyd.

A. Well, I just stated that other pictures have been made, many of them?

Q. Is that an answer?

The Court: In other words, what is your opinion from your experience in the industry?

The Witness: Other pictures have been re-made and made tremendous amounts of money. What is the reason to assume that my picture cannot be just as good as the other pictures that have been re-made?

Q. How would you make \$400,000 or \$500,000 if you made the picture yourself? Do you mean the profit you would make out of it? Is that what you have in mind?

A. Naturally, that is what you would make out of it." (Tr. pp. 362, 363.)

It was error to admit this testimony. Such speculations and conjectures of plaintiff's president Lloyd are in the same category as that of plaintiff's other alleged experts, and cannot support the Court's award of damages.

In the leading case of *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98-102 (Cir. Ct., 8th Cir.), the Court said:

"The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and January 25, 1899. * * * Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature

of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. * * *

* * *

Did the plaintiff make any proof of this character at the trial below? The only evidence he offered relating to the damages which he claimed was his own testimony, and he directed this to four elements of injury which he evidently thought tended to show loss of profits, viz. loss of customers, diminution of supply of coal, decrease of volume of business, and the amount of his anticipated profits on sales that he did not make. * * * He produced no contracts he had ever made. He named no customer with whom he had ever had a contract, no customer whom he had lost. * * * Here are no facts—no data—from which the number of customers or the amount of custom which he had lost can be lawfully inferred, none which make the amount of the contracts for future delivery which he did not make either reasonably or unreasonably certain, no basis for even a fair conjecture. * * * But the evidence disclosed the fact that this \$12 to \$20 was the difference between the amount he paid for a car load of coal and the amount which he retailed it for, and that it would be necessary to deduct from this alleged profit the proper proportion of the expenses of hiring the teamsters, maintaining the teams and the office, handling the coal, and operating the business, before the actual profit could be ascertained; and there was no evidence of the amount of these expenses. * * *

* * *

Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are

made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts."

This is the settled rule of law, the testimony of the *plaintiff* in each of the following cases being in the same category as that of Lloyd in the instant case.

Sussex Land & Live Stock Co. v. Midwest Refining Co., 276 Fed. 932, 944, *aff'd* 294 Fed. 597 (Cir. Ct., 8th Cir.):

"In addition to the testimony of the witness Davis, president of the plaintiff company, other witnesses were introduced by the plaintiff as experts to testify to what was considered a fair and average profit per head in the sheep and cattle business in the community in which the business of the plaintiff was located.

I cannot conceive of any class of testimony which would bring the proof of damage more within the realm of speculation than does this class. It is a matter of common knowledge that success in business, and thereby the derivation of profits therefrom, depends upon many varying circumstances."

Davis v. Carnegie Steel Co., 244 Fed. 931, 934 (Cir. Ct., 6th Cir.):

"The sole basis of plaintiffs' claimed right of recovery is loss of profits, by being denied the right to perform. While plaintiffs showed the value of the crushed slag, there was no evidence of the cost of crushing and marketing it, and it seems to be assumed that a considerable portion at least required such treatment to make it marketable. The proof of profits lost was speculative and conjectural. Plaintiffs' testimony, based on inquiries at Detroit, that there was a given profit per ton at that place in the

handling and marketing of slag, was properly excluded; * * * ”

McCornick v. United States Mining Co., 185 Fed. 748, 750, 751 (Cir. Ct., 8th Cir.):

“Notwithstanding plaintiff had been in undisturbed possession of the mines in question for a number of years, it had only taken out, prior to the granting of the injunction, some 500 to 1,000 tons in all, and from the time of the dissolution of the injunction to the time of the trial (some 16 months), they took out but 7,500 tons. The manager of plaintiff, on being asked while on the witness stand why more ore was not taken out of the mines in question, answered:

‘I don’t know that I could give any definite reason. There were other ores just as convenient as those, and we have taken our time to get the others—simply haven’t got to it. It was ours, and we could take it out at any time.’

* * * the testimony of the witness that, but for the injunction, plaintiff could and would have taken out 100 tons per day, was but the expression of an opinion or conjecture, so far as it relates to the expression ‘would have.’

The damages sought to be recovered are based on an alleged loss of profits. The law with respect to loss of profits being the basis of a recovery in an action for damages is that profits which would have been realized, but for the act of defendant, and which are not open to objection of uncertainty or remoteness, may be recovered, but profits depending upon numerous uncertain and changing contingencies are too indefinite and untrustworthy to constitute a just measure of actual damages. *Howard v. Stillwell & Pierce Mfg. Co.*, 139 U. S. 119, 11 Sup. Ct. 500, 35 L. Ed. 147; *Coosaw Min. Co. v. Carolina Min. Co., et al.* (C. C.) 75 Fed. 860; *Central Coal & Coke Co. v. Hartman*, 49 C. C. A. 244, 111 Fed. 96; *Cincinnati Gas Co. v. Western Siemens Co.*, 152 U. S. 200, 14 Sup. Ct.

523, 38 L. Ed. 411; Callaway Min. & Mfg. Co. v. Clark, 32 Mo. 305.”

Iron City Toolworks, Ltd. v. Welisch, 128 Fed. 693, 694-697 (Cir. Ct., 3rd Cir.):

“The main question, however, underlying them all, and with which we are here alone concerned, is whether the plaintiff was entitled to recover as damages, alleged profits which he claimed he might have realized but for the breach of contract on the part of the defendant. * * *

* * * Upon this testimony of the plaintiff himself, as to what profits he believed he might have made, had the contract been fulfilled according to its terms, the learned judge of the court below charged, as follows:

“* * * Under the evidence in this case, you will determine what the plaintiff could have sold these picks for if they had been delivered to him in accordance with the terms of his contract. * * * The law in a case of this kind seeks, as far as is humanly possible, to give compensation to one who has been aggrieved by a breach of contract, pecuniary compensation, and in accordance with that principle of law I have instructed you, and I now repeat the instruction, that the true measure of damages here, the just and legal measure of damages, is the actual loss which the plaintiff sustained by reason of the failure to deliver these picks for the purpose for which they were intended. You have the testimony of the plaintiff as to the demand and as to what he was offered for these picks, and you have in the order figures by which, it seems to me, you may arrive at the actual loss he sustained if you find in his favor.’

The learned judge stated to the jury that the true measure of damages here, was the actual loss which the plaintiff sustained by reason of the failure to deliver these picks for the purpose for which they were intended. This, as a broad statement of the

general rule, is quite correct. The difficult question is, what are the elements of this 'actual loss,' which is to be the measure of damage in a given case? or, in this case, how far are expected profits, or profits which plaintiff claims might have been realized but for the breach of contract by the defendant, such an element? No element of loss can be considered in the computation of damages, that is not clearly and unqualifiedly proved, and for this reason, the general rule, correctly stated by the learned judge in his charge, has always excluded proof of uncertain or speculative profits. * * * Such evidence has not the degree of certainty required by the law, and the hardship that may in particular cases accrue to individual plaintiffs by the exclusion of such testimony, must be weighed against the greater hardship and inconvenience that would result in the administration of justice from the admission of testimony of so vague and indefinite a character.

* * *

No facts are adduced in support of plaintiff's opinion. It is hard to imagine a case where profits could be more justly characterized as speculative and uncertain."

In *Brent v. Thornton*, 106 Fed. 35-37 (Cir. Ct., 5th Cir.), concerning the "testimony of the defendant in error H. H. Thornton which the plaintiff in error moved to have stricken out on the trial," the Court said:

"This testimony the plaintiff in error moved to strike out on the ground that it was uncertain and speculative; that the \$375 which it was claimed that the Monarch would have earned by assisting in pulling off such vessel was uncertain, and speculative, and too remote.

* * *

Opinion testimony as to the probability of employment, and the amount of the earnings if employed, is

too speculative and contingent to be the foundation of any rule of damages.”

D'Ole v. Kansas City Star Co., 94 Fed. 840, 841 (Cir. Ct., W. D. Missouri):

“He never sold a single copy of the pamphlet, nor even offered it for sale. He had never, prior to this publication in the *Star*, had any estimation made by any publishing house or merchant, or other person, as to any terms upon which they would undertake its sale. And the only evidence offered at this trial in respect of its commercial value is his statement and that of one other witness to the effect that they thought it could be sold by some business house to persons who might desire to have their photographs taken, or to other photographers, * * * From which it is quite apparent that any estimation the court could place upon its value would be highly speculative. Furthermore, how could the court, with any degree of required certainty, justifying the assignment of damages against the defendant, determine what damage resulted to the plaintiff from such publication in this newspaper? The plaintiff did not distribute, or attempt to distribute, or sell, a single copy of this pamphlet after the publication in the newspaper, to enable the court by comparison to determine in the remotest degree how the commercial value of his pamphlet was affected by such publication. He could not, without such test or effort, content himself by simply saying that he assumed that his exclusive property in the pamphlet was injured by the newspaper publication, and that it would be useless for him to make the effort to dispose of his pamphlet. Such a method of constituting a basis for the assessment of damages would be too easy for the plaintiff, and would certainly be a very unsafe criterion for the court to recognize in assessing such damages.”

Johnson v. Levy, 3 Cal. App. 591, 596 (86 Pac. 810):

“The evidence touching damages lacks every element of certainty. It consists solely of the guess or reasons for the guess. Both the direct and cross examinations of the plaintiff, and even this is not supported by data or particulars, demonstrate that he had no personal knowledge upon which to base an estimate, and the information derived from others was of the most general and indefinite character.

It is well settled that such evidence will not support a finding as to damages. (*Hayes v. Windsor*, 130 Cal. 235 [62 Pac. 395]).”

Page 74. Under the statement “there are many cases where federal courts have awarded judgment for damages in copyright infringement or kindred matters predicated upon the plaintiff’s own testimony,” plaintiff cites three cases, viz.:

(1) *Atlantic Monthly Company v. Post Publishing Company*, 27 Fed. (2d) 556. Plaintiff establishes by competent factual proof, the actual loss suffered by plaintiff’s going business.

(2) *Paramount Productions v. Smith*, 91 Fed. (2d) 863, 867. Plaintiff established by competent factual proof, the actual value of plaintiff’s story both with and without screen credit, which this Court said (p. 867) was “sufficient as a gauge for the measure of damages.”

(3) *Detective Comics, Inc. v. Bruns Publications*, 28 Fed. Supp. 399. There is nothing in the decision in this case evidencing that plaintiff gave any testimony on damages. Furthermore, the award was not of actual but statutory damages (p. 401), “which I have fixed under Section 25 (b) of the Copyright Act, 17 U. S. C. A. Sec. 25 (b), at fifteen hundred dollars (\$1500).”

Pages 75-82. Under Point III (C) plaintiff cites a number of authorities promulgating the rule that expert testi-

mony can be used to prove the value of property, which is subject to the axiomatic limitation that such testimony must have a factual basis. (See Point III of defendant Universal's Opening Brief.)

Thus, as is said in *32 Corpus Juris Secundum, Evidence*, Secs. 521, 522 (pp. 219, 220):

"The party offering an expert is at liberty to reinforce his judgment, even before any attempt is made to discredit or impeach it, by showing the grounds on which it is based, provided such facts are relevant and admissible for the purpose; but facts so stated do not become evidence in the case. Where the evidence does not disclose the existence of sufficient data on which to base a reasonable judgment, the opinion is incompetent.

* * *

While absolute certainty is not required of an expert, it is necessary that the facts on which an expert relies for his opinion should afford a reasonably accurate basis for his conclusions. Accordingly, no matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture; in other words, the factual foundation for the expert opinion must not be nebulous."

Plaintiff cites *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 Fed. (2d) 45, aff'd 309 U. S. 390 (60 Sup. Ct. 681, 84 L. Ed. 825), which case involved the apportionment of profits. That this decision was not intended to affect the established rule of law regarding expert testimony on damages, is evidenced by the pertinent decisions of the Supreme Court shortly prior and subsequent to the *Sheldon* case, viz.:

U. S. v. Safety Car Heating Co., 297 U. S. 88, 98 (56 Sup. Ct. 353, 80 Law Ed. 500):

"In the second place, a claim for damages like one for an infringer's profits is too contingent and un-

certain to have a determinable market value when the validity of the patent is unsettled and contested and the factors making up the damage are arrived at by conjecture. *Sinclair Refining Co. v. Jenkins Petroleum Co.*, 289 U. S. 689, 697."

Connecticut Ry. Co. v. Palmer, 305 U. S. 493, 505 (59 Sup. Ct. 316, 83 Law. Ed. 309):

"It is well understood that such evidence must show damages to reasonable certainty. Mere 'plausible anticipation' does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind."

Union Pacific Railroad Co. v. United States, 313 U. S. 450, 474 (61 Sup. Ct. 1064, 85 Law. Ed. 1453):

"When enough evidence is offered to justify a conclusion based upon judgment and not guesswork, the requirements of the judicial process are met. Cf. *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U. S. 544, 559, and cases cited."

Pages 82-86. Under Point III (D) plaintiff cites a number of cases to the effect that intrinsic value of property may be shown where market value does not exist. Thus plaintiff attempts to circumvent the Court's ruling that Lloyd's testimony actually established that such rights had "a market value" (Tr. pp. 107, 108).

As was said in *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 290, 298, 299, 300, (54 Sup. Ct. 647, 78 L. Ed. 1267):

"As to that issue the burden of proof rests heavily on the appellant. *Los Angeles Gas & Electric Corp. v. Railroad Commission of California*, 289 U. S. 287, 304, 305. In the endeavor to sustain it there has been an attempt to establish market and intrinsic

values by the estimates of experts as well as by actual sales.

* * * Variations so wide are sufficient of themselves to disprove the existence of a market in the strict or proper sense. *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U. S. 689, 697, 698, 699. * * *

The appellant has attempted to correct these uncertainties by supplementing the opinions of its experts with testimony of actual sales. But they were sporadic transactions, separate in time and space, and at prices too disparate to supply a helpful test of value."

The difficulty with plaintiff's position is, that the intrinsic value of the rights to plaintiff's picture, i. e., the profits which plaintiff or someone else might make if the picture was ever re-issued or re-made, was not established.

Pages 87-89, Point III (E). This is answered under I (10) of this brief.

Pages 90-92, Point III (F). This is answered under I (7) of this brief.

Pages 93-96, Point IV (A). Plaintiff relies upon the decision of this Court in *Harold Lloyd Corporation v. Witwer*, 65 Fed. (2d) 1, to the effect that a party calling an officer of an adverse party vouches for his credibility. This decision was rendered on April 10, 1933. However, Rule 43 (b) Fed. Rules Civ. Proc. (effective January 3, 1938) provides to the contrary:

"A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party
* * *."

Pages 96-98, Point IV (B). This is answered under I (9) of this brief. As to the contention that defendant

could not impeach Lloyd, the president of plaintiff corporation, see defendant's answer to Point IV (A), *supra*.

Pages 99-104. Points V (A) and (B). This is answered under I (2), (3) and (4) of this brief and Point VII, A, B, C and D of defendant Universal's Opening Brief.

Plaintiff says (p. 102) that the equitable defense of laches cannot be interposed in an action at law. The complaint contains two alleged causes of action. They are in substance the same, although under the first cause of action plaintiff demands legal relief and under the second cause of action equitable relief. Assuming, however, that this is an action at law, the equitable defense of laches may nevertheless be interposed.

28 U. S. C., Sec. 398 (Mar. 3, 1915, ch. 90, 38 Stat. 956), under the heading "Equitable defenses and equitable relief in actions at law," provides in part:

"In all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the Court."

Under the purview of this Section the equitable defense of laches can be interposed in any action at law.

Banker v. Ford Motor Co., 69 Fed. (2d) 665, 666 (Cir. Ct., 3rd Cir.):

"Had the appellant's suit been in equity, the evidence would have been ample for holding that recovery was barred because of laches. * * *

The appellant admits the authority of the cited cases if applied in equity, but contends that they are inapplicable to actions at law. But that contention is met by section 274b of the Judicial Code (28 USCA, § 398), * * *

The above-quoted section in terms authorizes equitable defenses in actions at law theretofore applicable

only in equity. *Ford v. Huff* (C. C. A.), 296 F. 652, certiorari denied 266 U. S. 602, 45 S. Ct. 90, 69 L. Ed. 462.”

To the same effect:

Ford v. Huff, 296 Fed. 652, 657, 658 (Cir. Ct., 5th Cir.), cert. den. 266 U. S. 602 (45 Sup. Ct. 90, 69 L. Ed. 462);

Universal Coin Lock Co. v. American Sanitary Lock Co., 104 Fed. (2d) 781, 782, 783;

Dovel v. Sloss-Sheffield Steel & Iron Co., 139 Fed. (2d) 36, 38 (Cir. Ct., 5th Cir.), cert. den. 322 U. S. 740 (64 Sup. Ct. 1057, 88 L. Ed. 1573);

Mather v. Ford Motor Co., 40 Fed. Supp. 589, 591, 592.

Conclusion

See Conclusion (p. 78) Opening Brief For Appellant and Cross-Appellee Universal Pictures Company, Inc.

Respectfully submitted,

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